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In the Supreme Court of the United States

OCTOBER TERM, 1969

THEODORE J. GOTTHELF AND TOBY GOTTHELF,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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No. 224

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COMMISSIONER OF INTERNAL REVENUE

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OPINIONS BELOW

The opinion of the Tax Court (Pet. 10a-17a) is reported at 48 T.C. 690. The opinion of the court of appeals (Pet. 3a-9a) is reported at 407 F. 2d 491.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1969. A petition for rehearing, filed after the granting of an extension of time in which to

file, was denied on March 13, 1969. The petition for a writ of certiorari was filed on June 11, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether part of the payments petitioner made to his former wife, pursuant to a separation agreement, were fixed by the agreement as sums payable for child support, and were therefore neither deductible by petitioner nor includable in the income of the former wife, pursuant to the provisions of Sections 71 and 215 of the Internal Revenue Code of 1954.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 71 and 215 of the Internal Revenue Code of 1954 and of Section 1.71-1 of the Treasury Regulations on Income Tax (1954 Code) are set forth in the Appendix, *infra*, pp. 7-8.

STATEMENT

Sara Gotthelf and petitioner,[1] Theodore Gotthelf, were married in 1951. They had two children. On March 28, 1958, they entered into a separation agreement. A week later they were divorced. The separation agreement was incorporated by reference into the divorce decree.

The agreement provided that petitioner would pay Sara, as long as she lived and did not remarry,

[1] "Petitioner" refers to Theodore Gotthelf. His wife, Toby Gotthelf, is a party because joint returns were filed.

$12,000 annually in equal monthly installments of $1,000 for her support and for the support, care (including, but not by way of limitation, medical care and expenses), maintenance and education of the children. If Sara remarried, the amount payable would be reduced to $7,000 annually, payable in monthly installments. Upon death, marriage, reaching of twenty-one years of age, or separate residence of a child, the amount payable annually would be reduced by $3,500 for each child. A rider attached to the agreement provided that the agreement would be binding on petitioner's estate to the extent of the payment of $7,000 "for the benefit of the two children, as in this agreement provided for." (Pet. 4a-6a, 12a-14a.)

In his income tax return for the year 1960, petitioner claimed a deduction, as alimony, of the $11,400 paid Sara in that year (Pet. 6a, 14a). Sara included $4,400, as gross income in her return, representing the $11,400 received less $7,000 which she treated as payments for the support of the children rather than as alimony (Pet. 7a, 14a). In the face of this conflicting treatment, the Commissioner of Internal Revenue determined deficiencies against both petitioner and Sara. As against petitioner, the Commissioner took the position that $7,000 was child support and not deductible. In the alternative, to protect the revenue, the Commissioner asserted as against Sara that the full amount was alimony and therefore taxable income to her.

The Tax Court, in a consolidated proceeding in effect sustained Sara's treatment of the transaction by concluding that the agreement, including the rider,

fixed in terms of an amount of money the sum payable for the support of the two children (Pet. 16a-17a). It accordingly held that the $7,000 was neither deductible by petitioner nor includable in Sara's gross income (Pet. 10a-17a). The court of appeals affirmed (Pet. 9a).

ARGUMENT

The decision below, affirming that of the Tax Court, turns on the language of a written agreement providing for payments from a divorced husband to his former wife. It is in accord with decisions of this Court. There is no conflict of decisions or other occasion for further review.

1. Section 71 of the Internal Revenue Code of 1954 (Appendix, *infra*, p. 7) requires a divorced wife who who receives alimony to include the full amount in receives alimony to include the full amount in gross income and Section 215 (App., *infra*, p. 8) allows her former husband an equivalent deduction. As an exception, in Section 71(b), the payments are neither includable in the former wife's income nor deductible by the husband to the extent that the terms of a written agreement "fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of minor children of the husband." To come within the exception, the agreement providing for the periodic payments must specifically state the amounts or parts thereof allocable to the support of the children. *Commissioner* v. *Lester*, 366 U.S. 299, 301.

After analyzing the agreement and the rider attached to the agreement, which is undeniably an integral part of the written agreement, the Tax Court concluded that the agreement did "fix, in terms of an amount of money" the sum payable for the support of the two children. The Tax Court's conclusion is fully justified by the express terms of the agreement and was properly sustained by the court below. As the Second Circuit concluded (Pet. 8a):

> The language of the rider binding Theodore's estate to the extent of $7,000 "for the benefit of the two children *as in this agreement provided for*" makes specific that which would otherwise have been left for inference.

Petitioner's contentions based on analysis of the agreement without the rider are misplaced. The simple answer is that the agreement included the rider. No factual basis for a contrary contention exists and none were found by the courts below.

2. Petitioner's reliance upon local law is likewise misplaced. This Court has emphatically stated that it is irrelevant whether, under local law, the terms of a written agreement require that specific amounts be used by the wife solely for the support of the children. *Commissioner* v. *Lester*, *supra*, at p. 304.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE 1969.

APPENDIX

Internal Revenue Code of 1954:

SEC. 71. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS.

(a) *General Rule.*—

(1) *Decree of divorce or separate maintenance.*—If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

* * * *

(b) *Payments to Support Minor Children.*—Subsection (a) shall not apply to that part of any payment which the terms of the decree, instrument, or agreement fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of minor children of the husband. For purposes of the preceding sentence, if any payment is less than the amount specified in the decree, instrument, or agreement, then so much of such payment as does not exceed the sum payable for support shall be considered a payment for such support.

* * * *

(26 U.S.C. 1964 ed., Sec. 71.)

SEC. 215. ALIMONY, ETC., PAYMENTS.

(a) *General Rule.*—In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the preceding sentence with respect to any payment if, by reason of section 71 (d) or 682, the amount thereof is not includible in the husband's gross income.

* * * *

(26 U.S.C. 1964 ed., Sec. 215.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.71-1 *Alimony and separate maintenance payments; income to wife or former wife.*

* * * *

(e) *Payments for support of minor children.* Section 71(a) does not apply to that part of any periodic payment which, by the terms of the decree, instrument, or agreement under section 71 (a), is specifically designated as a sum payable for the support of minor children of the husband. * * * If, however, the periodic payments are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in section 71(a). * * *

(26 C.F.R., Sec. 1.71-1.)

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